Supreme Court, U.S.
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No. 01-784

In The

Supreme Court of the United States

UNITED STATES, *ex rel.* ROBERT J. NORBECK,

Petitioner,

v.

BASIN ELECTRIC POWER COOPERATIVE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GARY HANSEN
Counsel of Record
EDWARD F. FOX
OPPENHEIMER, WOLFF & DONNELLY LLP
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
(612) 607-7584

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Basin Electric Power Cooperative ("Basin Electric") built and operates Antelope Valley Station ("AVS"). That facility consists of two power generation units, AVS I and AVS II, and the Common Facilities that serve those units. In 1982, before AVS II was built, Western Area Power Administration ("WAPA") entered into a Power Supply Agreement ("PSA") to purchase power from AVS II when it was completed. WAPA agreed to pay for the power based on the costs recorded by Basin Electric to certain accounts in the RUS System of Accounts, the system established by the Rural Utility Services ("RUS"), the federal regulatory agency that guaranteed most of Basin Electric's borrowing. Those costs included the interest and depreciation costs associated with ownership of AVS II. They also included those costs, and others, associated with the Common Facilities, some of which were allocated to AVS I and some of which were allocated to AVS II, depending on the use those generation units made of the Common Facilities.

The AVS Facility was built with borrowed funds. The debt was not separated into AVS I debt, AVS II debt, and Common Facilities debt; but, rather, was pooled, in accordance with well accepted accounting practice and with the knowledge of the RUS. Petitioner's stubborn refusal to acknowledge the implications of this pooling methodology has infected and distorted his presentation of the issue on which he seeks *certiorari*.

Before WAPA began taking power under the PSA, Basin Electric sold AVS II generating unit (but not AVS I or the Common Facilities) and then leased it back. Thus,

Basin Electric incurred rent expense instead of interest and depreciation expense. The PSA was amended to reflect this fact and to provide that WAPA would pay its share of the rent recorded to the applicable RUS account, but would not pay any interest or depreciation that would otherwise have been attributed to the ownership of AVS II. Of course, WAPA was still required to pay its share of the interest and depreciation costs allocated to the Common Facilities, since the Common Facilities were still owned by Basin Electric.

Basin Electric used the sale leaseback proceeds to retire its highest interest rate debt, some of which was unrelated to AVS, rather than to retire only AVS pooled debt. The parties, the trial court, and the Eighth Circuit all concur that this was a prudent and appropriate business decision.

The dispute in this case has centered around the effect the decision to retire non-AVS debt had on the billings to WAPA. Petitioner alleged that interest on all of the AVS debt which could have been retired, but was not, was allocated directly to AVS II, where it found its way into WAPA's bills based on WAPA's share of the power generated by AVS II (just over 41 percent). Petitioner claimed this overcharge totaled $15 million.

If Petitioner had been correct in his demonstrably incorrect assumption that all interest was allocated to AVS II and then billed to WAPA and others using AVS II power, then the $15 million figure would also have been correct. The arithmetic was not in issue. However, the underlying premise was never proved. When the sale leaseback transaction was completed, Basin Electric

stopped allocating any interest directly to AVS II. Thus, WAPA was not charged any interest in that manner. Still, there was an inadvertent back door effect on WAPA. Even after the sale of AVS II, a portion of the interest on the pooled debt appropriately continued to be allocated to the Common Facilities, a portion of which was, in turn, also appropriately allocated to AVS II. Forty-one percent of that allocated amount was then billed to WAPA.

By inadvertence, Basin Electric allocated **all** of the total interest figure on pooled debt to AVS I and the Common Facilities. It neglected to first reduce the interest by the amount associated with debt that could have been, but was not, retired with sale leaseback proceeds. As a result, not directly, but through the permissible Common Facilities allocation, WAPA was mistakenly overcharged approximately $2.4 million over the life of the PSA. This was discovered in February of 1993, two years before Petitioner initiated this action, was immediately reported to WAPA, and was refunded to WAPA after the complicated refund calculations were made and verified.

Before the government intervened in Petitioner's false claim action, it retained KPMG Peat Marwick ("KPMG") to conduct an audit of the PSA. An initial draft audit concluded that there had been a $15 million overcharge based on two fundamentally flawed and objectively incorrect assumptions. First, the initial draft audit incorrectly assumed that AVS debt was not pooled, but rather that each of the three components of AVS had its own debt. Second, it assumed that approximately $100 million of the supposedly separate AVS II debt was not

retired and that Basin Electric continued to directly allocate interest on that $100 million of debt to AVS II. With these assumptions, KPMG calculated what the resulting interest overcharge would have been if its assumptions were correct. Importantly, KPMG never compared these calculations against actual billings to see what was in fact billed to WAPA. In short, then, KPMG calculated how much should **not** have been billed to WAPA, but it never took any steps to determine whether any of that amount actually was billed to WAPA.

KPMG soon learned that its assumptions were not correct. It did this by visiting with representatives of the RUS who confirmed that the AVS debt was pooled, as Basin Electric had explained, not separately maintained for each AVS component, as Petitioner had argued and as KPMG had initially assumed. Based on that information, KPMG abandoned this audit issue and the government never pursued it.

Based exclusively on KPMG's initial draft and without ever developing any of his own evidence or loss computations, however, Petitioner pursued the issue on his own. At trial, his only witness on the issue was Lester Heitger, an accounting professor. Petitioner did not examine the KPMG auditors on this issue, nor ask a single question about the issue of Shawn Deisz, Basin Electric's main accounting witness.

Heitger's testimony on this issue was completely derivative of the abandoned KPMG initial draft audit. He admitted that he completed no independent investigation and conceded that he did nothing more than check the KPMG arithmetic to verify that it was correct. This meant

that Heitger's analysis and testimony was compromised by the fundamental errors in the KPMG's analysis – it **assumed** that interest was directly attributed to AVS II, and calculated the amount that should **not** have been billed to WAPA. However, neither the draft audit report nor Heitger's testimony, which was derived from it, ever investigated whether an overcharge had actually occurred. Hence, the fact that KPMG's arithmetic was correct, which Basin Electric has always accepted, did nothing to meet Petitioner's burden of establishing an actual overcharge.

In a moment of candor at oral argument before the Eighth Circuit, Petitioner admitted that neither KPMG nor Heitger had examined the billings to WAPA to determine whether KPMG's calculation of a theoretical overcharge had come to reality in the billings:[1]

> The Court: Did either the KPMG auditors or your own experts examine the billings?
>
> Counsel: Ah, no. . . .

Noting this telling concession, the completely derivative nature of Heitger's testimony, the irreparable flaws in the KPMG initial draft audit, and the complete lack of any evidence establishing an overcharge (other than the inadvertent back door overcharge previously identified, acknowledged, and refunded by Basin Electric) the Eighth Circuit correctly ruled that the absence of any competent, objective no evidence supporting the trial court's decision in favor of Petitioner required reversal of

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[1] There is no transcript of the oral argument, but the actual recording is available on the Eighth Circuit's website.

that decision and entry of judgment in favor of Basin Electric.

SUMMARY OF THE ARGUMENT

This case presents no issues worthy of consideration by this Court. There is no showing that the Eighth Circuit's decision conflicts with any decision of this Court or of any other circuit Court of Appeals. There is not even any dispute about the standard to be applied, which is set out in the Petition. The problem for Petitioner is that he misperceives and misrepresents what the Eighth Circuit did. The court did not review conflicting evidence or the testimony of dueling experts and strike a different balance than the trial court. After an exhaustive review of the record the court reached the inevitable determination that there was a complete lack of any evidence on the one fact Petitioner absolutely had to establish: There was simply no evidence of an overcharge. Without that evidence the judgment could not stand and was properly reversed.

Petitioner asks this Court to grant *certiorari* in order to review whether the Eighth Circuit was correct in finding no evidence of an essential element of Petitioner's proof. Such a review would not resolve any conflicts of law nor even involve any new interpretations of law. It would have no significance beyond the narrow facts of this dispute, and does not warrant this Court's involvement. The Petition should be denied.

ARGUMENT

I. The Eighth Circuit Correctly Reversed the Judgment Because on the Complete Absence of Any Evidence of an Actual Overcharge and Petitioner's Failure to Bear His Burden of Proof on that Issue.

Petitioner cites a number of cases to support various statements of the general principle that an appellate court must defer to the trial court's credibility and fact-finding assessments. There is no disagreement about the holdings of those cases; but they have no bearing on this case.

Though Petitioner describes the Eighth Circuit's decision as an impermissible redetermination of the evidence and, therefore, out of harmony with the cases he cites, the Eighth Circuit did no such thing. It didn't strike a balance between competing evidence or between competing testimony. Instead, it found that the trial court's decision was not supported by any evidence whatsoever.

The Eighth Circuit made this crystal clear:

- "On appeal, Basin asks that we reverse the district court's award, arguing that Norbeck [footnote omitted] introduced **no evidence** to support the district court's judgment. We agree . . . " (App. 6[2]) (emphasis added).

- "Norbeck does **not cite to any evidence**, other than the **abandoned KPMG audit**, suggesting interest from the $99.5 million was directly allocated to AVS II (as the KPMG audit **incorrectly assumed**)." (App. 13) (emphasis added).

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[2] All citations to the Eighth Circuit opinion are to Petitioner's Appendix, identified as "App. ___."

- "Since **neither Heitger nor Norbeck have presented any evidence** that suggests KPMG's initial (and later **abandoned) assumption** was correct, Heitger's support for the KPMG audit proves nothing. . . . **[H]e failed to provide any evidence** that KPMG's assumption was, in fact, correct." (App. 14) (emphasis added).

- "Further, even if the money was misappropriated, **Norbeck cannot show** any connection between the misappropriation and WAPA's lease cost." (App. 14-15) (emphasis added).

- "We find **no evidence** to support the district court's award of damages past the $2.4 million Basin already returned to WAPA." (App. 15) (emphasis added).

- " . . . we find **no evidence** to support the district court's finding of fraud in the first place . . . ." (App. 16, n.13) (emphasis added).

- **"What is lacking** from this analysis **is any evidence** that Basin knew, or acted in reckless disregard, of the possibility that any of the interest from this $99.5 million was actually charged to WAPA." (App. 18) (emphasis added).

- "Nowhere does the district court or Norbeck **point to any evidence** that Basin knew that interest from the $99.5 million was charged to WAPA through a back door, i.e., through interest payments from the common facilities." (App. 18-19) (emphasis added).

- "The correct question is whether Basin knew it was overcharging WAPA, not whether Basin knew it was paying off non-AVS debt. **The district court did not point to any evidence of this."** (App. 19, n.15) (emphasis added).

- "Even if the district court was correct that the $99.5 million should have somehow been applied directly to debt charged to WAPA, it provides **no evidence** that

the audit team knew or acted in reckless disregard of the possibility that its assumption was incorrect. The audit team's deliberate choice of this assumption cannot be fraud if they honestly believed it was a correct assumption, and the district court does not point to any evidence suggesting that was the case." (App. 20) (emphasis added).

- "We believe Norbeck **failed to introduce evidence** showing Basin overcharged WAPA beyond the $2.4 million Basin returned before trial." (App. 21) (emphasis added).

- "We further believe that **Norbeck has failed to provide any evidence** that Basin submitted these payments with the reckless disregard for the truth necessary under the False Claims Act." (App. 21) (emphasis added).

Petitioner's argument that the Eighth Circuit interfered with the trial court's discretion to evaluate conflicting testimony, to accept or reject experts, and to weigh credibility might have some appeal if the Eighth Circuit had decided that the trial court struck the wrong balance between contested facts, or had favored the wrong expert. But, as amply illustrated above, the Eighth Circuit did no such thing. It did not reweigh any facts or discard any testimony. It simply understood what the trial court had not: that Heitger's testimony, the only testimony in support of Petitioner's claim, suffered from the same debilitating defects as the abandoned KPMG initial draft audit on which it was based. It assumed an overcharge based on an objectively and admittedly incorrect assumption about the pooled AUS debt; and once, being confronted with the critical error, Petitioner never bridged

the gap by providing any evidence of an actual overcharge. To prove an overcharge, Petitioner needed to compare what he believed WAPA should not have been billed with what WAPA was billed, to determine if the billing was correct. KPMG did not do that and Heitger did not do that. In fact, Heitger did no independent work at all. Thus, especially given the magnitude of the $36 million judgment on this issue, the Eighth Circuit scoured the record in vain for any objective evidence of an overcharge, found none, and correctly ruled that the judgment had to be reversed.

At oral argument, Petitioner admitted no one had examined actual billings on his behalf to prove an overcharge. The only witness who did that work was Shawn Deisz, a Basin Electric employee and accounting expert, who determined and testified there was no overcharge other than the inadvertent $2.4 million overcharge (through the back door of the Common Facilities), which was never in dispute. In crediting Deisz's uncontroverted, uncross-examined testimony, the Eighth Circuit did not favor it over Heitger's testimony, as Petitioner posits. Unlike Deisz, Heitger never examined the bills and never testified whether such an examination would show an overcharge. Instead, like KPMG, he simply forged ahead with the incorrect assumption that all interest on the unretired AVS debt was directly attributed to AVS II, and then multiplied that by 41 percent to obtain a theoretical, potential overcharge.

The Eighth Circuit acted properly when it noted the non-existence of Heitger's factual support and identified the trial court's clear error in entering judgment against Basin Electric when there were no facts supporting that

judgment. This is not, as Petitioner argues, a case of accepting Deisz's view over the competing view of Heitger. It was a case of requiring a plaintiff in a false claims case to present actual, competent evidence of an actual overcharge and of ruling against that plaintiff when he failed to do so.

II. The Petition Should be Denied Because of Petitioner's Misstatement of the Record, and Distortion of the Pertinent Accounting Issues.

Arguing for a different outcome, Petitioner makes numerous incorrect statements about the record. It is impossible to respond to all of those mistakes here, but several typical misstatements of the record merit comment.

We are told Heitger testified to the "entity concept" and that this concept requires accounting transactions to be recorded so they can be properly allocated among various separate entities. (Petition at 13-14). Petitioner suggests that this concept was violated when AVS debt was pooled rather than separately assigned to the components of the AVS facility. He argues that no Basin Electric witness testified this was a proper way to keep Basin Electric's books.

Heitger's actual testimony on the "entity concept" was very different than represented, especially because it was not even presented in connection with this issue. Heitger never testified that the pooling of AVS debt violated that concept. But, even if he had, and even if he had been correct, it would do Petitioner no good. The claim against Basin Electric was that it falsely billed WAPA for

interest. Regardless of how the interest was recorded on Basin Electric's books, Petitioner was still required to show an actual overcharge, a showing he clearly never made.

There is a similar problem with Petitioner's reference to Heitger's testimony on accounting concepts such as "consistency, historical costs, and uniformity." Petitioner claims Heitger cited these principles to support his testimony on this issue and that the trial court found "the requirement of uniformity and consistency to be controlling." (Petition at 19).

This claim is wrong. Heitger's testimony, and the trial court's observation, was on an entirely different issue. On that issue, Heitger argued Basin Electric should have used a particular amortization period for one facility to be consistent with the amortization period it had selected for an entirely separate facility in a different location some years earlier. That issue, on which the Eighth Circuit also ruled in favor of Basin Electric, is not before this Court and Heitger's testimony has no bearing whatsoever on the issue presented in his Petition.

Petitioner argues that KPMG did not abandon its initial draft audit finding as a result of learning from the RUS that Basin Electric had correctly described the manner in which it accounted for AVS debt. Instead, he suggests that KPMG became frustrated over the lack of available information and "gave up" on the issue. (Petition at 15-17).

As the Eighth Circuit observed, the KPMG auditor's testimony, on which Petitioner conducted no cross-examination, tells a different story:

Q. Okay. I neglected to ask you something I wanted to address. When you went back . . . and found out that the debt for AVS was not pooled, were any of the claims or any of the issues in your audit report abandoned **as a result of those consultations?**

A. Yes.

Q. What issue or claim was abandoned as a result of that investigation.

A. That first issue on the leveraged lease transaction.

Q. Okay. And just so the record is clear on that, was that the issue about whether or not the refund that was ultimately made to WAPA should have been 2.4 million dollars or 13 million dollars.

A. Yes, I think so.

App. 13-14, n.10 (Citing Trial Tr. of Arvle Hix at 74) (emphasis added). Moreover, Petitioner once again glosses over a crucial point. Even if KPMG had abandoned its claim out of frustration rather than out of understanding, Petitioner was still required to establish that an overcharge actually occurred, which he failed to do.

Petitioner's most flagrant recrafting of the record is his description of the work done by Heitger to provide a basis for his testimony. Despite his concession at oral argument, petitioner now tells us that Heitger reviewed the "voluminous billings" from Basin Electric to WAPA. (Petition at 18-19). That assertion is not supported anywhere in the trial record and, as we have already seen, it is directly contradicted by Petitioner's own admission

before the Eighth Circuit that neither the KPMG auditors nor Heitger examined the bills.

Persistently undaunted by the facts, Petitioner claims that Heitger did independent work of his own on this issue. (Petition at 19). This is belied by Heitger's own testimony, in which he acknowledged that he accepted the KPMG initial draft audit as written, did no independent analysis, and simply checked the arithmetical correctness of KPMG's calculation of an amount that should not have been billed to WAPA. The Eighth Circuit fully understood that, regardless of his credentials, this was the extent of Heitger's analysis:

- "Heitger's review of the audit was limited, however, to checking KPMG's work; he did not conduct a new audit." (App. 11).
- "Although Heitger relied upon the KPMG audit, he did not independently recalculate this audit. Rather, he testified that he 'redid that [KPMG] calculation' and 'concluded that it was an appropriate calculation.' " (App. 13, n.9) (Citing Trial Tr. of Lester Heitger at 130).
- "Although Heitger checked KPMG's calculations to make sure they were correct, his testimony does not support the **faulty assumption** of separate debt upon which the entire KPMG audit was based. In fact, he specifically acknowledged that Basin pooled all of its debt. (Trial Tr. of Lester Heitger at 132-33). Since neither Heitger nor Norbeck have presented **any evidence that suggests KPMG's initial (and later abandoned) assumption was correct**, Heitger's support for the KPMG **audit proves nothing**. All Professor Heitger could correctly testify to was that *if* KPMG's assumptions were correct, *then* the KPMG figures were correct. However, **he failed to provide any**

> **evidence** that KPMG's assumption was, in fact, correct. [footnote omitted]. We believe, therefore, that Heitger's approval of the KPMG audit, when KPMG backed away from its own conclusions, cannot support the district court's judgment." (App. 14) (italicized emphasis in original, bold emphasis added).

Heitger did no independent work. Petitioner's revisionist suggestion that he did is plainly wrong and hardly calls for any further review by this Court.

In a final misreading of the record, Petitioner quotes the Eighth Circuit decision out of context to support an argument that the court held him to too strict a standard for establishing that billings to WAPA were false. (Petition at 24-28). He points out that it is sufficient for him to establish that Basin Electric acted with reckless disregard of an overcharge, and that he was not required to show actual knowledge of an overcharge. He then quotes from a footnote in the decision where the court wrote: "The correct question is whether Basin knew it was overcharging WAPA, not whether Basin knew it was paying off non-AVS debt." (App. 19, n.15).

On its face, it is clear that this footnote is not addressing the standard of "intentionality." Rather, it is simply making the point that Petitioner had incorrectly tried to argue that Basin's knowledge that it was using sales leaseback proceeds to retire non-AVS debt was proof of Basin's knowledge of an overcharge to WAPA. When the Eighth Circuit addressed itself to the proof required of Petitioner it wrote as follows:

- "In order for Basin to be liable under the False Claims Act, it must have submitted the false claims with the requisite mental state. (footnote omitted).

> The lowest level of intentionality that satisfies the False Claims Act is 'act[ing] in reckless disregard of the truth or falsity of the information.' " (citation omitted) (App. 16-17).

- "What is lacking from this analysis is any evidence that Basin knew, or acted in reckless disregard, of the possibility that any of the interest from this $99.5 million was actually charged to WAPA." (App. 18).
- "Even if the district court was correct that the $99.5 million should have somehow been applied directly to debt charged to WAPA, it provides no evidence that the audit team knew or acted in reckless disregard of the possibility that its assumption was incorrect." (App. 20).
- We further believe that Norbeck has failed to provide any evidence that Basin submitted these payments with the reckless disregard for the truth necessary under the False Claims Act. (App. 21).

Obviously, the Eighth Circuit applied the correct standard. Petitioner's attempt to paint a different picture is disingenuous and should be rejected.

CONCLUSION

Petitioner's Petition badly misstates the record and mischaracterizes the Eighth Circuit's decision. That decision raised no significant, controversial, or conflicting questions of law. Rather, it simply concluded, after a careful, exhaustive review of the record, that there was no objective evidence to support the trial court's determination that Basin Electric had overcharged WAPA. This decision was correct and is not a decision that justifies

further review by this Court. Basin Electric asks this Court to deny the Petition.

Respectfully submitted,

GARY HANSEN
EDWARD F. FOX
OPPENHEIMER, WOLFF & DONNELLY LLP
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
(612) 607-7584

Attorneys for Respondent